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658875—62

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 364

JAMES R. HOFFA AND ROBERT E. MCCARTHY, JR.,
PETITIONERS

v.

HONORABLE JOSEPH P. LIEB, UNITED STATES DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF FLORIDA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The order of the court of appeals (Pet. App. 1a; R. 76) is not reported.

JURISDICTION

The judgment of the court of appeals denying leave to file a petition for writ of mandamus was entered on June 27, 1962 (Pet. App. 1a.; R. 76). A petition for rehearing was denied on July 24, 1962 (Pet. App. 1a.; R. 84). The petition for a writ of certiorari was filed on August 22, 1962. The jurisdiction of the Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether petitioners were properly denied leave to file a petition for a writ of mandamus to compel the district court to vacate an order refusing to dismiss the indictment and setting a trial date.

STATEMENT

Petitioners were indicted in the Southern District of Florida, on October 11, 1961, on sixteen counts charging fraud by mail and wire, and conspiracy to use the mails to defraud. On November 30, 1961, both petitioners moved to dismiss the indictment on numerous grounds, including claims that the grand jury had been improperly selected and constituted, and that prejudicial publicity deprived them of a fair and impartial grand jury.

After a full hearing, commencing March 12, 1962,[1] at which testimony was taken, the district court entered an order on May 23, 1962, denying petitioners' motions to dismiss the indictment and setting the case for trial on September 10, 1962. Petitioners then filed in the Court of Appeals for the Fifth Circuit a motion for leave to file a petition for a writ of mandamus to compel the district court to dismiss the indictment and vacate the setting of the trial. This was denied on June 27, 1962.

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[1] An appeal from orders of the district court quashing certain subpoenas issued by petitioners in connection with this hearing was dismissed by the Court of Appeals for the Fifth Circuit on June 1, 1962. A petition for a writ of certiorari to review that judgment is presently pending (No. 314, this Term).

ARGUMENT

1. In seeking a writ of mandamus directing the court to dismiss the indictment and vacate the setting of the trial, petitioners were attempting to do indirectly what they could not do directly, *i.e.*, appeal at this stage of the proceedings from the interlocutory order of the district court denying their motions to dismiss the indictment. An order denying a motion to dismiss an indictment is not a final judgment within the meaning of 28 U.S.C. 1291,[2] and is therefore not appealable. See *Chereton* v. *United States*, 256 F. 2d 576 (C.A. 6); *United States* v. *Golden*, 239 F. 2d 877, 878 (C.A. 2); *Kyle* v. *United States*, 211 F. 2d 912, 914 (C.A. 9); *United States* v. *Foster*, 278 F. 2d 567, 569 (C.A. 2), certiorari denied, 364 U.S. 834; *Atlantic Fishermen's Union* v. *United States*, 197 F. 2d 519, 520 (C.A. 1); *Conway* v. *United States*, 142 F. 2d 202, 203 (C.A. 9); *United States* v. *Tiplitz*, 202 F. 2d 60 (C.A. 3); *Parr* v. *United States*, 351 U.S. 513, 518.

This Court, as far back as 1828, refused to permit circumvention, by way of mandamus, of the rule that only final orders may be appealed. Chief Justice Marshall, in *Bank of Columbia* v. *Sweeny*, 1 Pet. 567, 569, denied a motion for a writ of mandamus directed to the circuit court for the District of Columbia, saying:

> If this motion could now prevail, it would be a plain evasion of the provision of the act of

[2] 28 U.S.C. 1291 provides in pertinent part, "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States * * *."

> congress, that *final* judgments only should be brought before this court for re-examination. * * * The effect, therefore, of this mode of interposition, would be to retard decisions upon questions which were not final in the court below, so that the same cause might come before this court many times, before there would be a final judgment. * * *

This case is governed by *Roche* v. *Evaporated Milk Assn.*, 319 U.S. 21, 30, where a writ of mandamus directing the district court to reinstate pleas in abatement attacking the authority of the grand jury to return an indictment was held to have been improperly issued. This Court noted:

> Where the appeal statutes establish the conditions of appellate review, an appellate court cannot rightly exercise its discretion to issue a writ whose only effect would be to avoid those conditions and thwart the Congressional policy against piecemeal appeals in criminal cases. * * *

See also *Parr* v. *United States*, 351 U.S. 513, 520–521; *Fujimoto* v. *United States District Court*, 199 F. 2d 27 (C.A. 9); *American Airlines* v. *Forman*, 204 F. 2d 230, 232 (C.A. 3).

This is not a situation where the district court was taking a wrong view of its authority as in *Dairy Queen* v. *Wood*, 369 U.S. 469, and *Beacon Theatres* v. *Westover*, 359 U.S. 500, relied upon by petitioner. In the case at bar as in *Roche* (319 U.S. at 32)—

> * * * the district court has acted within its jurisdiction and has rendered a decision which, even if erroneous, involved no abuse of judicial power. * * *

The district court's opinion (R. 44–71) recites findings of fact and conclusions of law which reflect a judicial determination of the motions to dismiss the indictment, a matter within its jurisdiction to determine. All that petitioners are claiming is that the district court reached the wrong conclusion. That is a matter to be determined on appeal if there is a final conviction.[3]

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1962.

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[3] Since it is clear that the petitioners' motion for leave to file a petition for a writ of mandamus was properly denied by the court of appeals for the reasons stated above in the text, we do not state the facts or argue the merits of petitioners' allegations concerning the selection of the grand jury which indicted them. However, we in no way assent to the allegations contained in the petition for certiorari.

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